

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-006146

08/05/2011

COMMISSIONER JAMES R. MORROW

CLERK OF THE COURT
H. Beal
Deputy

U S BANK NATIONAL ASSOCIATION

LEONARD J MCDONALD

v.

RACHAEL EARL

KEVIN L JENSEN

MINUTE ENTRY

Courtroom: OCH-001.

3:30 p.m. This is the time set for hearing re: Oral Argument on Defendant's Motion to set Aside Judgment of Forcible Detainer and Motion to Stay the Issuance of a Writ or Quash a Writ already Issued. Plaintiff appears through counsel, Aaron Lloyd. Defendant, Rachael Earl, is present with counsel, Kevin Jensen.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

This matter came before the Court for oral argument on Rachael Earl's Motion to Set Aside Judgment of Forcible Detainer and Motion to Stay the Issuance of a Writ or Quash a Writ Already Issued ("Motion") asserting that she was not properly served. US Bank National Association as Trustee for GSAA 2007-9 ("US Bank") responded opposing the Motion ("Response"), and Earl filed a Reply in Opposition to Plaintiff's Response to Motion to Set Aside Judgment and Stay the Issuance of the Writ ("Reply"). In addition to reviewing the documents and the file, the Court reviewed the For the Record digital recordings of the prior proceedings in this matter held on February 22, 2010, and March 1, 2010.

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US Bank did not personally serve Earl in this matter. Instead, on February 16, 2010, US Bank served the summons and complaint on Earl by a procedure commonly referred to as “nail and mail.” (Affidavit filed August 20, 2010) Although the process was common at the time, it did not comport with the service requirements of Rules of Procedure for Eviction Actions, Rule 5(f). *See Arizona Real Estate Inv., Inc. v. Schrader*, 226 Ariz. 128, 244 P.3d 565 (App. 2010) (decided after judgment had been entered in this matter).

Earl failed to properly preserve her defense concerning insufficiency of service of process. She attended the proceeding on February 22, 2010. That proceeding, however, was limited to a brief discussion concerning Earl’s removal of this matter to federal court. On February 22, 2010, Earl took no action to request dismissal of the action for insufficient service of process. Similarly, Earl appeared for the proceeding on March 1, 2010. After confirming that the case had been returned from the federal court, Comm. Cunanan proceeded with the initial appearance. Earl asked for additional time to file an answer. Earl did not move for dismissal of the complaint for insufficient service of process. The man accompanying Earl on March 1, 2010 (identified during the oral argument as Mr. Earl) did ask Comm. Cunanan if he could ask about service of process. Comm. Cunanan explained that he was not their attorney and could not give them legal advice. Comm. Cunanan did inform them, with respect to the general topic of service of process, “that is something that you bring up if you think it is appropriate.” He further added, “You can file whatever motion you want. I’ll set a motion filing deadline date to,” and those deadlines were set. For reasons not explained in the record before the Court, Earl did not follow up on Comm. Cunanan’s invitation to file a motion on the issue.

Earl retained counsel. On June 16, 2010, Earl filed her Verified Answer to Complaint (“Answer”). In her Answer, she did not assert the defense of insufficient service of process. Instead, she affirmatively asserted that plaintiff had failed to state a claim, that plaintiff was not the real party in interest and lacked standing, that plaintiff lacked a valid subsisting interest in the property, and that the trustees’ sale was void. The Answer also contained a generic assertion of “any and all defenses found in Rules 12(b) and 8(c) Arizona Rules of Civil Procedure.” Neither before nor after filing her Answer did Earl file a motion seeking dismissal for insufficient service of process. Moreover, Earl did not raise the issue of insufficient service of process in response to US Bank’s motion for judgment on the pleadings or otherwise ask for a ruling on her service of process issue before the grant of judgment on August 19, 2010. Through Earl’s conduct in litigating this matter, Earl waived any objection to US Bank’s reliance on the “nail and mail” method of service of process.

Accordingly,

IT IS ORDERED denying Defendant’s request to strike the Response as untimely.

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IT IS FURTHER ORDERED denying the Motion to Set Aside Judgment of Forcible Detainer and Motion to Stay the Issuance of a Writ or Quash a Writ Already Issued.

IT IS FURTHER ORDERED denying US Bank's request for an award of attorneys' fees under A.R.S. § 12-349.

3:56 p.m. Matter concludes.

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.